



LOUISIANA ASSOCIATION OF DEFENSE COUNSEL NEWSLETTER

2012:2

February 1, 2012

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UPCOMING MEETINGS

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|--------------------------|--|---------------|
| Feb. 10-11, 2012 | LADC 2012 North Louisiana Seminar,
Petroleum Club, Shreveport | 10.0*# |
| Feb. 23, 2012 | LADC 2012 Associates Skills Set Seminar,
Lucy's Retired Surfers Restaurant, New
Orleans | 2.0 |
| April 24-29, 2012 | LADC Annual Meeting, Costa Rica | 8.0*# |

(A registration form may be downloaded or you may register online at www.ladc.org if registration is open at this time.)

* - includes one credit for professional responsibility (ethics)
- includes one credit for professionalism

BULLETIN BOARD

ONLINE REGISTRATION: You now can register online for LADC seminars. To register online, visit the LADC website and click the link for the seminar. You will have the option of paying by credit card or having an invoice sent to you by email. For a while, we will preserve the method of downloading a registration form from the LADC website and mailing it in. The LADC website address is <http://www.ladc.org>.

DUES NOTICES: You should have received your 2012 LADC dues notice. Because we still are working with our online payment feature, we were not able to set up dues payment via the online system. We hope to resolve this for next year. Thank you for your continuing membership in and support of the LADC. Please send dues payment before April 1st.

2012 NORTH LOUISIANA SEMINAR: The annual seminar will be Feb. 10-11, 2012 at a new venue: the Petroleum Club. Begin the year with 10 hours of CLE. Speakers include La. Supreme Court Justice Marcus Clark (Oral Arguments Before the Supreme Court), U.S. District Court Judge Maury Hicks and Magistrate Judge Mark Hornsby (Federal Court Practice), La. 1st JDC Judges Roy Brun and Jeanette Garrett (Practice Pointers from a Judge's Perspective), and La. 1st JDC Judge Scott Crichton (Effective Pre-trial Advocacy—and Beyond). Other topics include Ethics and Professionalism. Registration is open online at www.ladc.org.

SECOND ASSOCIATES SKILLS SET SEMINAR: The first LADC mini-seminar focusing on skills needed by junior associates was held in New Orleans on Dec. 8, 2011. The seminars will be held every other month. The concept was proposed by LADC Board member Sarah Kirkpatrick and approved by the LADC Board last August. The second such seminar will be held at Lucy's Retired Surfers Bar & Restaurant in New Orleans on Thursday, Feb. 23 at 4-6 p.m. The CLE program will focus on written discovery, depositions, and strategies for filing motions to compel. Registration is now open on the LADC website.

COSTA RICA ANNUAL MEETING: Our Costa Rica program is the most innovative in years. For the first time at an annual meeting, the LADC is offering individual condos of one, two or three bedrooms with full kitchens and patios. Your refrigerator will be stocked on arrival. Restaurants and a few shops are nearby, the ocean and the jungle are in your back yard, the hospitality suite is open daily, and each delegate will have a golf cart to get around. Have a look at the brochure at 2012 LADC Costa Rica CLE or contact Peter McLean at ptmclean@hotmail.com. It is important to sign up now to get what you want. Register now on the LADC website.

MEMBERSHIP DRIVE: At the August 18 meeting of the LADC Board, the Board launched a membership drive. It is the goal of the LADC to add at least 100 members by the end of April 2012. For 2012, the LADC will make available a free one-year membership for those who have never been LADC members. Please help us recruit some new members for our organization.

LADC BOARD MEETING: The first board meeting of the year is scheduled for Friday, February 24, 2012. If you know of matters that should be considered by the board, please contact a board member or officer.

"CALLING ALL LAWYERS!!!" Your LADC has recently instituted a Pro Bono Committee. We are happy to announce our first initiative - "Calling All Lawyers!!!" - a pilot program in conjunction with the Louisiana Civil Justice Center ("LCJC"). We need your help to make it a success. The LCJC receives numerous calls from people from around the state simply looking for guidance on a number of legal issues. That's where we come in! For those individuals wishing to speak with a lawyer, the LCJC staff will obtain their contact information and the nature of their inquiry. That information will be provided to a volunteer lawyer who will call the "clients" to discuss their issue. We, as volunteer lawyers, will accept a 2 hour shift during which time we will attempt to assist between 5 – 8 "clients." Don't worry - we will be providing our volunteers with information regarding frequently asked questions and contact numbers for various agencies to provide to the clients. Initially, the 2 hour slots will be from 7 a.m to 9 a.m. on Tuesdays and 4 p.m to 6 p.m. on Thursdays. We will not be taking on the clients' cases, so the volunteer's involvement will be limited to the 2 hour session. Once we have assisted the client, we will provide a brief report to the LCJC advising of the advice given. For more information or to volunteer, please contact Will Montz: wmontz@ln-law.com; 337.237.7000.

DIVERSITY CONCLAVE: The LADC is co-sponsoring the LSBA Fifth Annual Conclave on Diversity in the Legal Profession: "The Professional Workplace: Conquering the Myths and Creating a Competitive Advantage." It will be held at the New Orleans Marriott on Canal Street

(555 Canal Street, New Orleans) on March 2, 2012. For more details, contact Kelly McNeil Legier at 504-619-0129. To register, go to <http://www.lsba.org/GoTo/conclave>.

KEY DEVELOPMENTS

Arbitration

Where the claim is intertwined with, and dependent upon, a contract, a non-signatory to a contract with an arbitration clause can be compelled to arbitrate under an equitable estoppel theory. Sturdy Built Homes, L.L.C. v Carl E. Woodward, L.L.C., Fourth Circuit, No. 2011-CA-0881 (12/14/11)

Discovery, Penalties

In Lasseigne v Gerald E. Landry, LLC., plaintiff's attorney failed to meet the discovery deadlines, and the trial court entered a judgment of dismissal with prejudice. Thirteen days after the judgment of dismissal was entered, plaintiff's attorney died, due to a rare blood condition. Plaintiff was unaware that her case had been dismissed. Held, dismissal must be reversed and the matter remanded for an evaluation of the appropriate sanction under the factors set forth in Horton v McCary, 635 So 2d 199 (La. 1994). Third Circuit, No. 11-584 (12/14/11) (five judge court; Amy, J, dissents)

Insurance

A divided Supreme Court has concluded that R.S. 22:658(A)(3) (timely initiation of lost adjustment) does not require a showing of bad faith by the insurer, but simply requires proof of notice and no action for over thirty days. The court also rules that the provisions of R.S. 22:1220(c) "cap" the penalties for such inaction at \$5,000 when damages are not proven. Oubre v Louisiana Citizens Fair Plan, Supreme Court, No. 2011-C-0097 (12/16/11) (Victory, Weimer and Guidry, JJ, dissenting)

An insurer's mass issuance of checks handed out merely upon the recipients' word without any step taken by insurer to evaluate underlying claims does not satisfy the requirements that the insurer take affirmative action to evaluate the claim in order to constitute the initiation of loss of adjustment and satisfy the penalty provision of R.S. 22: 658 (A) (3) for failure to timely institute loss adjustment. Oubre v Louisiana Citizens Fair Plan, supra.

Torts; Right of Privacy

Plaintiff, after being involved in an accident, made a claim against defendant insurer. Subsequently, plaintiff was a passenger in a vehicle involved in another accident; several passengers in that vehicle made claims against the insurer in the second accident, but the plaintiff did not. The defendant in the second accident served a subpoena on defendant insurer to produce its file, including all claims by plaintiff. Defendant insurer complied. The documents at issue were voluntarily submitted by plaintiff to defendant insurer without any restrictions on their use. Defendant insurer did not act in bad faith. Held, plaintiff does not have a claim against

defendant insurer for invasion of privacy. Alessi v Loehn, Supreme Court, No. 11-CC-1914 (12/16/11) (Knoll, J, dissents)

Vicarious Liability

A settlement by a tortfeasor with an employee for an altercation occurring in the scope of employment bars the employee's separate recovery of damages against the co-employee tortfeasor for whom the employer was vicariously liable, even though the settlement with the employer had an express reservation of rights against the co-employee tortfeasor. Nizzo v Wallace, Fifth (La) Circuit, No. 11-CA-467 (12/28/11)

Worker Compensation; LHWCA

The U.S. Supreme Court has ruled that the OCSLA may provide coverage for a worker who spent about 98% of his time on an offshore building platform performing maintenance and other duties, but who was killed while working at his employer's onshore processing facility; because the act extends to an employee who establishes a substantial nexus between the energy and the employer's extractive operations on the OCS. Pacific Operators Offshore, LLP v Valladolid, _____ U. S. ____, (2012)

OTHER SIGNIFICANT DEVELOPMENTS

Attorney Fees

Regardless of the statutory authorization for an award of attorney's fees, courts should examine certain factors, which include the ultimate result; the responsibility incurred; the importance of the litigation; the amount of money involved; the extent and character of the work performed; the legal knowledge, attainment, and skill of the attorneys; the number of appearances involved; the intricacies of the facts involved; the diligence and skill of counsel; and the court's own knowledge. Where there is no indication that the trial court took into account those factors to be considered in making an award of attorney's fees, the matter must be remanded for a determination of the amount of attorney's fees to be awarded. Sicard v Sicard, Fifth (La.) Circuit, No. 11-CA-423 (12/28/11)

Corporations

The shareholders have a right to inspect a corporation's records as to all of its ownership interest in its assets, regardless of the location of the assets, and the corporation has the obligation to make those records available to the share owners. Feil v Greater Lakeside Corporation, Fifth (La.) Circuit, No. 11-CA-92 (12/13/11) (five judge court; Chehardy and Rothschild, JJ, dissent)

Court Costs

The district court committed legal error in assessing the costs against the party who was granted pauper status and obtained a default judgment. Porter v Porter, Second Circuit, No. 46,754-CA (12/14/11)

Court Rules

Under Uniform District Court Rule 9.9, a trial court may refuse to allow a claimant to testify or present evidence at a hearing on an exception due to a failure to comply with court rules and file an opposition to the exception. Duncan v Qurens LLC, Fifth (La) Circuit, No. 11-CA-289 (12/28/11)

Damages

Eye: \$ 300,000 where cement thrust into worker's eye caused intense pain for forty-eight hours, numerous surgical procedures and constant fear of loss of sight. Powell v Chabanais Concrete Pumping, Inc., Fifth (La) Circuit, No. 11-CA-408, (12/28/11)

Medical Malpractice

A patient was injured as she was attempting to get out of a hydraulic chair of a whirlpool, which was treatment ordered by her physician and administered by a hospital therapist. Held, the claim must be presented to a medical review panel before filing suit against the hospital. Armand v Lady of the Sea General Hospital, First Circuit, No. 2011 CA 1083 (12/21/11)

An allegation of euthanasia by a doctor is an intentional tort that is not covered by the Louisiana Medical Malpractice Act and need not be presented to a medical review panel. Lagasse v Tenet Healthsystem Memorial Medical Center, Inc., Fourth Circuit, No. 2011-CA-0782 (12/14/11) (Tobias, J, concurring)

Summary Judgment

Counsel's withdrawal before the hearing on summary judgment, and the unrepresented litigant's claim is dismissed without any indication in the record that the claimant received notice from the OWC judge, is improper and "implicates due process concerns." Roman v LRSIF Claims Management, Fifth (La) Circuit, No. 11-CA-393 (12/13/11)

A police report does not comply with the requirement that supporting affidavits shall be made on personal knowledge on summary judgment. There must be an affidavit or deposition by the police officer who authored the report. Drury v Allstate Insurance Co., Fifth (La) Circuit No. 11-CA-509 (12/28/11)

Torts; Malicious Prosecution

Where a party has communicated to his counsel all the facts bearing on the case of which he has knowledge, or could have ascertained by reasonable diligence and inquiry, and has acted on the advice received honestly and in good faith, the absence of malice is established, the want of probable cause is negated, and the action for malicious prosecution will not lie. McClanahan v McClanahan, Fifth (La) Circuit, No. 11-CA-284 (12/28/11)

Torts; Respondeat Superior

A physician's being on call at the time of his automobile accident does not automatically give rise to employer liability where his personal activities throughout the day were not sufficiently connected to his employment duties. Migliore v Gill, Fifth (La) Circuit, 11-CA-407 (12/13/11)

Torts; Immunity

The Recreational Immunity Act applies to a slip and fall on a levee used for recreational purposes as an access to an adjoining boat ramp. Richard v Louisiana Newpack Shrimp Company, Inc., Fifth (La.) Circuit, No. 11-CA-309 (12/28/11)

Torts; Vessel

A divided Third Circuit, following Breaux v Saint Charles Gaming Co., Inc., 68 So. 3d 684, and De La Rosa v Saint Charles Gaming Co., 474 F 3d 185, holds that the M/V Casino is not a vessel for general maritime law purposes in a suit by a patron intoxicated when he fell aboard it; thus his claim is governed by RS 9: 2800.1, limiting liability for loss connected with the service of alcoholic beverages. Lemelle v St. Charles Gaming Co., Inc., No. CA 11-255 (1/4/12) (five judge court; Thibodeaux, C.J, and Cooks, J, dissent)

Venue: Forum Non Conveniens

Forum selection clauses are legal and binding in Louisiana, except as specifically prohibited by law. These clauses are prima facie valid and should be enforced unless the resisting party clearly proves that enforcement would be unreasonable and unjust, or that enforcement would contravene a strong public policy of the forum where the suit is brought. A party seeking to set aside such a clause has a heavy burden. Enforcement of a forum selection clause would be unreasonable and unjust if enforcement would contravene a strong public policy of protecting the rights of small Louisiana companies to bring contractual disputes to Louisiana courts. Aquatic Lodging, LLC v Bayou Boys Boat Rental, LLC, Fifth (La.) Circuit, No. 11-CA-382 (12/28/11) To the same effect, see Rising Resources Control, Inc. v KIE Commodities and Finance, L.L.C., First Circuit, No. 2011 CA 1026 (12/21/11)

Worker Compensation

Suits involving “piercing the corporate veil” and the “alter ego” doctrine fall under the business corporation law. The district court, and not the OWC, has jurisdiction of an action seeking to pierce the corporate veil under R.S. 12:1 et seq. James v Nationwide Restoration, LLC, Fifth (La) Circuit, No. 11-CA-307 (12/13/11)

The Third Circuit has reaffirmed its earlier decision in Hargrave v State that the WCJ did not err in affirming specified conditions that claimant’s counsel set for claimant’s vocational rehabilitation services; however, the WCJ erred in affirming the condition that “no other person has provided vocational rehabilitation in the case.” No. WCA 11:836 (1/5/12) (Gremillion, dissents in part)

When an employer is convinced that the IME doctor's findings and recommendations are correct, it may terminate the employee's benefits at the employer's peril. However, the employer may not seek another remedy that does not put it at peril for penalties and attorney fees by maintaining a declaratory judgment under R.S. 23:1314. Fru-Con Construction Corp. v Kierum, Third Circuit, No. WCA 11-529 (12/12/11)

MARITIME MATTERS

Maintenance and Cure

Where a seaman purchased his own medical insurance, the appropriate amount for cure is the lesser amount his healthcare providers accepted as full payment from his insurer. Manderson v Chet Morrison Contractors, Inc., ___ F 3d ___ (5th Cir., 2012)